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In the Supreme Court of the United States

OCTOBER TERM, 1979

1776 K STREET ASSOCIATES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 1a-7a) dismissing petitioners' suit is reported at 603 F. 2d 354. The order of the Court of Claims (Pet. App. 8a-9a) denying petitioners' motion for reconsideration, rehearing, or, in the alternative, for rehearing en banc is unreported.

JURISDICTION

The judgment of the Court of Claims was entered on July 18, 1979. The Court of Claims denied petitioners' motion for reconsideration, rehearing, or, in the alternative, suggestion for rehearing en banc, on September 28, 1979. The Chief Justice extended the time

within which to file this petition to and including February 25, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims abused its discretion in dismissing petitioners' independent action for relief from a prior judgment of that court in *Washington Medical Center, Inc.* v. *United States*, 545 F. 2d 116 (1976), cert. denied, 434 U.S. 902 (1977), reh. denied, 435 U.S. 1018 (1978), where the Court of Claims had previously denied petitioners' motions for a rehearing and for relief from that judgment based upon newly discovered evidence, and this Court had declined review.

RULE INVOLVED

Rule 152(b) of the Rules of the United States Court of Claims provides:

> *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.; response; reply.* On motion conforming to Rule 51 and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 151(c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or

> otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. A motion under this paragraph (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. * * *

STATEMENT

On December 5, 1978, petitioners filed suit in the Court of Claims to obtain relief from a prior judgment of that court, specifically *Washington Medical Center, Inc.* v. *United States*, 545 F. 2d 116 (1976) (Pet. App. 61a-105a). Petitioners styled their suit as an "independent action" within the inherent power of the Court of Claims. Additionally, they sought relief from the prior judgment based upon Rules 152(b)(5) and (6) of that court, which allow the court, "upon such terms as are just," to relieve a party from a final judgment where it is "no longer equitable that the judgment should have prospective application" or where "any other reason justif[ies]" relief from the operation of the judgment. Jurisdiction was alleged to rest upon the Fifth Amendment of the United States Constitution and 28 U.S.C. 1491.

1. Between 1967 and 1970, the petitioners in the instant case applied to the District of Columbia Council to close various original alleys within Washington, D.C., the titles to which were believed to be in the United States. The

Council closed the pertinent alleys after the petitioners had paid monies representing the fair market value of the alleys.[1] These monies were placed into the United States Treasury. Petitioners made these payments without protest and without any contention they that were illegal or unauthorized. They received title to the closed alleys and have used them for their own purposes ever since the closings.

2. Between 1972 and 1975, the petitioners instituted separate suits against the United States in the Court of Claims. These suits were subsequently consolidated and a decision entered under the name of *Washington Medical, supra.*[2]

In *Washington Medical*, the petitioners sought to recover the monies they had voluntarily paid to have the original alleys closed. The contention that the United States never held title to the original alleys was not raised in these cases until after 1974 when it was interjected in related litigation in the United States District Court. The original grounds asserted for the recovery were: The Council lacked statutory authority to require payments for the closings under the statutes relied upon in the resolutions authorizing the closings; the land areas closed had only a nominal value; and the payments were required in violation of the District of Columbia Administrative Procedure Act, D.C. Code § 1-1501 *et seq.*

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[1]The Council acted pursuant to D.C. Code §§ 7-303 and 7-401 *et seq.* (1973). See also § 7-302 (1973). These Sections of the D.C. Code were enacted by Congress, not the District of Columbia Council.

[2]All but one of the plaintiffs in *Washington Medical* are petitioners in the instant case. The remaining plaintiff, Jack Kogok, whose interest was in an original street rather than an original alley, is not a party to the instant proceeding.

(1973). The United States countered that the plaintiffs were estopped by their prior actions from claiming the refunds, and that, in any event, the District of Columbia Council was fully authorized by Acts of Congress to make charges for the closing of streets and alleys the title to which was in the United States.

In its decision in *Washington Medical*, issued October 20, 1976 (Pet. App. 61a-105a), the Court of Claims indicated it could have decided against the plaintiffs on the ground of estoppel. Instead, it ruled on the title to both the original streets and alleys. In determining ownership of the alleys, the court looked to the authorizing congressional legislation, the initial agreement between the original proprietors and the commissioners that laid out the Federal City, the actual conveyances from the original proprietors, and President Washington's regulations implementing the powers granted to him in the preceding documents. These documents gave the President the "sole power of directing the federal city to be laid off in what manner he pleases" (*id.* at 75a). After the city was divided into squares, the President directed that there be a "way into the square," that is, an alley, and that "the property in the same is reserved to the public" (*id.* at 76a). The Court of Claims concluded that by this provision President Washington reserved fee simple title to the alleys in the United States (*id.* at 78a).[3]

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[3]The court also concluded that the relevant Acts of Congress fully authorized the District of Columbia Council to charge for the closings of original streets and alleys (Pet. App. 90a-101a), that the District could charge fair market value for the lands closed rather than a nominal value (Pet. App. 102a-103a), and that the closings had violated neither the D.C. Administrative Procedure Act nor due process (Pet. App. 103a-104a).

The plaintiffs in *Washington Medical* subsequently filed a suggestion for rehearing en banc and motion for rehearing and reconsideration, which the Court of Claims denied on January 7, 1977 (Pet. App. 106a). On April 18, 1977, the plaintiffs filed a paper styled "Motion for Relief from Judgment and Remand to Trial Judge for Trial on Issue of Title to Alleyways," allegedly pursuant to Rule 152(b) of the Rules of the Court of Claims. Plaintiffs claimed that they had uncovered " 'additional compelling evidence to support their title claims,' " consisting of a book containing a number of documents obtained from the National Archives. 211 Ct. Cl. 379 (1977). On May 20, 1977, the Court of Claims denied plaintiffs' motion holding that they had failed to show the exceptional circumstances which would entitle them to the extraordinary relief they sought. Neither had they shown that the newly discovered evidence could not have been discovered prior to trial through the exercise of reasonable diligence, nor that the evidence would probably change the outcome of the case. *Id.* at 380.

3. Plaintiffs subsequently petitioned this Court for a writ of certiorari on June 3, 1977 (No. 76-1719), challenging the Court of Claims' holding that the United States owned title to the original alleys and its denial of their Rule 152(b) motion for relief from judgment. In their petition they requested deferral of this Court's consideration until final decisions were rendered in *Chesapeake & Potomac Telephone Co.* v. *District of Columbia*, Civil No. 2671-75 (D.C. Super. Ct. filed Mar. 25, 1975), and *Carr* v. *District of Columbia*, Civil No. 74-73 (D.D.C. filed Jan. 12, 1973), which involved identical questions of title. This Court chose not to defer consideration, and denied certiorari on October 17, 1977. 434 U.S. 902.

When, on March 28, 1978, the Superior Court of the District of Columbia decided that the United States did not own fee simple title to the original alleys within the city, *Chesapeake & Potomac Telephone Co.* v. *District of Columbia, supra,*[4] the plaintiffs petitioned for a rehearing of this Court's denial of certiorari. This Court denied their petition on May 1, 1978. 435 U.S. 1018.

4. Petitioners then filed the instant independent action in the Court of Claims on December 5, 1978. Shortly thereafter, on January 12, 1979, the United States District Court for the District of Columbia, relying upon the decision of the Superior Court of the District of Columbia, also decided that the United States did not own fee simple title to the original alleys within the city (Pet. App. 52a-60a).[5] In the present case, the Court of Claims assumed *arguendo* that the United States did not hold title to the original alleys within the city. Even so, it found that the United States was not unjustly enriched by retaining the fees paid for the alley closings. The court also noted that plaintiffs had not alerted it during the pendency of the prior case that their search for evidence was unfinished. Finally, that court held that, absent circumstances not present, subsequent conflicting decisions do not require the reopening of a previous final decision.

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[4]See Pet. App. 10a-51a.

[5]Both these cases are now on appeal. The government's appeal in the *Carr* case is pending in the United States Court of Appeals for the District of Columbia Circuit (No. 79-1571). The government's appeal in the *Chesapeake & Potomac Telephone* case is pending in the District of Columbia Court of Appeals (Nos. 13570, 14206, 79-499).

ARGUMENT

Whether or not to entertain an action for relief from a prior judgment is peculiarly a matter resting within the sound discretion of the court involved. The decision below that, in the circumstances, petitioners were not entitled to maintain such an action does not conflict with any decision of this Court or that of any court of appeals, and does not merit further review.

1. An action for relief from judgment is equitable in nature.[6] It seeks relief that is extraordinary and may be granted only where there is a showing of exceptional circumstances. *Kaiser Aluminum & Chemical Corp.* v. *United States*, 409 F. 2d 238, 242 (Ct. Cl. 1969) (concurring opinion). The action is addressed to the sound discretion of the court, *Harjo* v. *Andrus*, 581 F. 2d 949, 953 (D.C. Cir. 1978), and the court's resolution may not be overturned absent a manifest abuse of discretion. *Williams* v. *United States*, 577 F. 2d 930 (5th Cir. 1978); *Valmont Industries, Inc.* v. *Enresco, Inc.*, 446 F. 2d 1193, 1195 (10th Cir. 1971), cert. denied, 405 U.S. 922 (1972). Here no such abuse was shown.

Petitioners sought relief for two reasons: newly discovered evidence; and subsequent decisions by the Superior Court of the District of Columbia and the United States District Court for the District of Columbia which conflicted with the Court of Claims' decision. This

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[6]Even though the Court of Claims may not grant specific equitable relief, *United States* v. *Testan*, 424 U.S. 392, 397-398 (1976); *United States* v. *King*, 395 U.S. 1, 2-3 (1969), a claim for money is not barred merely because it rests on equitable grounds. That Court may exercise equitable powers as an incident of its general jurisdiction. *Pauley Petroleum Inc.* v. *United States*, 591 F. 2d 1308, 1315 (Ct. Cl. 1979), cert. denied, No. 79-19 (Oct. 9, 1979).

Court was aware of the existence of the newly discovered evidence at the time it denied certiorari in *Washington Medical* in October 1977, and was aware of the subsequent decision of the Superior Court of the District of Columbia at the time it denied the petition for rehearing in May 1978.[7] Petitioners have not presented any new reasons that would justify review now.

This Court has never held that a subsequent change in the law may be the basis for a motion for relief from a prior judgment. In *Klapprott* v. *United States*, 335 U.S. 601 (1949), this Court granted the petitioner's Rule 60(b) motion[8] to set aside a default judgment entered against him in a denaturalization proceeding. The Court's decision was based upon exceptional circumstances which showed that the government's own action had made it impossible for the petitioner to be present at the denaturalization hearing. *Id.* at 604-608, 613-614. In *Ackermann* v. *United States*, 340 U.S. 193 (1950), a district court had entered judgments against the petitioner, his wife, and a relative canceling their certificates of denaturalization. The relative appealed, and, for reasons not explained in the Court's opinion, his case was reversed upon stipulation with the United States Attorney. The petitioner and his wife, who had failed to appeal, then filed a Rule 60(b) motion for relief from judgment. This Court did not find the exceptional circumstances which were present in *Klapprott*, and

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[7]One of the bases alleged in the petition for certiorari for overturning the Court of Claims' decision in *Washington Medical* was the newly discovered evidence. The sole ground for the petition for rehearing was the subsequent decision of the Superior Court of the District of Columbia.

[8]Rule 60(b), Fed. R. Civ. P., is the counterpart to Rule 152(b), Rules of United States Court of Claims.

denied relief. Finally, in *Polites* v. *United States*, 364 U.S. 426, 433 (1960), this Court recognized that the question whether relief was warranted when there had been a "clear and authoritative change" in governing law had not been decided, and left the matter unresolved.

Lower courts have overwhelmingly held that a subsequent change in the law does not affect the finality of a judgment. *Nunnery* v. *Barber*, 23 Fed. R. Serv. 2d 232, 233 (4th Cir. 1977); *Annat* v. *Beard*, 277 F. 2d 554, 559 (5th Cir.), cert. denied, 364 U.S. 908 (1960); *Title* v. *United States*, 263 F. 2d 28, 31 (9th Cir.), cert. denied, 359 U.S. 989 (1959); *Collins* v. *City of Wichita*, 254 F. 2d 837, 839 (10th Cir. 1958). In any event, the change in the law upon which petitioners here seek relief is not the "clear and authoritative" change suggested in *Polites* v. *United States, supra*, 364 U.S. at 433.[9]

2. Although the question is not presented in the procedural posture of this case, petitioners err in arguing that the doctrine of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), requires the Court of Claims to defer to the decisions of either the Superior Court of the District of

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[9]The cases petitioners cite (Pet. 9-10) are distinguishable. In *Tarkington* v. *United States Lines Co.*, 222 F. 2d 358 (2d Cir. 1955), the district court granted a Rule 60(b) motion that had been made after judgment but before the time for appeal had expired. In any event, *Tarkington* has been limited to its "special facts." *In re Texlon Corp.*, 596 F. 2d 1092, 1100 (2d Cir. 1979); *Schildhaus* v. *Moe*, 335 F. 2d 529, 530-531 (2d Cir. 1964). *Tsakonites* v. *Transpacific Carriers Corp.*, 322 F. Supp. 722 (S.D.N.Y. 1970), a district court case, has been criticized for departing from the principle that the doctrine of finality demands that rights under a judgment should not "remain in limine for an indefinite period awaiting the possibility that a future conflict in the circuits will bring about clarification of the law by the Supreme Court." 7 *Moore's Federal Practice* para. 60.27[2] n.21, at 360 (2d ed. 1979).

Columbia or the United States District Court for the District of Columbia. *Erie* held that in diversity jurisdiction cases federal courts must apply the law of the state in which they sit. 304 U.S. at 78. The Court's decision had constitutional underpinnings: all rights not delegated to the federal government were reserved to the states. It held that in developing a general body of a federal common law, federal courts had invaded those reserved rights. *Id.* at 80.[10] But the principle is inapplicable here. The District of Columbia is constitutionally distinct from the states. *Palmore* v. *United States*, 411 U.S. 389, 395 (1973). It is a creature of Congress, and not a state with reserved sovereignty. Although decisions of the District of Columbia courts on matters of local law are entitled to special deference, they do not bind the federal courts. *Whalen* v. *United States*, No. 78-5471 (Apr. 16, 1980), slip op. 2-3; *Tuxedo Contractors, Inc.* v. *Swindell-Dressler Co.*, 613 F. 2d 1159, 1161-1162 & n.14 (D.C. Cir. 1979); *Lee* v. *Flintkote Co.*, 593 F. 2d 1275, 1278 n.14 (D.C. Cir. 1979). What is more, the decisions invoked here do not apply rules of law enacted or adopted by the local government of the District, but, rather, construe regulations promulgated by the President of the United States under authority of Acts of Congress concerning property of the United States held for public use. Compare *United States* v. *Fullard-Leo*, 331 U.S. 256, 269-270 (1947); *Morris* v. *United States*, 174 U.S. 196, 240 (1899).

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[10]The authority for federal courts to decide questions of state law exists only by virtue of the Diversity Clause in Article III of the Constitution. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 537 (1962).

3. The Court of Claims' decision not to grant petitioners relief from the judgment in *Washington Medical* was not an abuse of discretion. As the Court of Claims previously found, petitioners were not free from fault in failing to present the "new evidence" to the Court of Claims at the prior hearing. That evidence, found in the National Archives, had always been available to the petitioners. 211 Ct. Cl. 379 (1977).[11]

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[11]Petitioners make three other arguments. First, they argue (Pet. 12-15) that there was no factual basis for the Court of Claims' estoppel determination. To the contrary, that court had before it the record in *Washington Medical*, of which it could take judicial notice. In *Washington Medical*, the court found it could have decided against petitioners on an estoppel basis, but chose to rule on other grounds (Pet. App. 66a-67a).

Second, they argue (Pet. 15-16) that the refusal of the Court of Claims to set aside its prior determination amounted to a deprivation of their property in violation of the Fifth Amendment. In *Washington Medical*, the Court of Claims found that the United States owned title to the original alleys. In the instant action, that court assumed *arguendo* that the new evidence "possibly could convince [it] that title to the involved alleys was not in the United States" (Pet. App. 3a), but that petitioners had presented no reasons which would justify reopening its prior decision. Such a ruling is not a "taking."

Finally, petitioners argue (Pet. 18-21) that the Court of Claims' decision conflicted with earlier decisions of this Court, the Superior Court of the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The same argument was advanced in their petition for certiorari in *Washington Medical* (76-1719 Pet. 10-16). As the United States pointed out in its brief in opposition to that petition (Br. in Opp. 4-6), the Court of Claims' decision as to the title issue does not conflict with these cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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